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HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES.

SEPTEMBER TERM, 1955.

No. 914

FERRIEL M. BARNETT,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

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BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Justices of the United States:

Your petitioner, Ferriel M. Barnett, respectfully petitions for a Writ of Certiorari to review the decision of the U. S. Court of Appeals for the Eighth Circuit, affirming the action of the District Court in directing a verdict in favor of the respondent and against petitioner, in an action brought under the Federal Employers' Liability Act, 45 U. S. C. A., Section 51.

OPINION BELOW.

The opinion of the U. S. Court of Appeals for the Eighth Circuit is reported in Ferriel M. Barnett v. Terminal Railroad Association of St. Louis, a corporation (not yet officially reported). A copy of the opinion begins on page 16 of the Appendix hereto.

An earlier opinion of the same court on a prior appeal of the same case will be found on page 27 of the Appendix hereto. That opinion was reported at 200 F. (2d) 893.

JURISDICTION.

This action arose and was determined under the Federal Employers' Liability Act (45 U. S. C. A., Section 51), for damages for personal injuries to petitioner while working as a car inspector and car repairman in St. Louis, Mo., at the yards of respondent, a rail carrier subject to said Act. The case was tried for the third time before Division 1 of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and at the close of all the evidence, respondent filed its motion for directed verdict which was deferred by the court and the case was sent to the jury. Upon failure of the jury to agree, they were discharged. Thereafter respondent made a motion for judgment in accordance with its motion for directed verdict. The District Court granted said motion and entered judgment dismissing petitioner's complaint on its merits. Thereafter, petitioner appealed to the United States Court of Appeals, and that Court affirmed the action of the District Court in dismissing petitioner's complaint on its merits, holding that there was no showing of negligence on the part of respondent. The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (1). The judgment of the United States Court

of Appeals was entered on the 17th day of January, 1956, and petitioner's motion for rehearing was denied and the mandate of that Court was then filed on the 16th day of March, 1956.

QUESTIONS PRESENTED.

Petitioner brought suit under the Federal Employers' Liability Act, Section 51, alleging that he was employed by respondent as a car inspector and car repairman, and that he was injured as a result of the negligence of respondent in that respondent allowed and permitted an air brake hose and the steam pipe on each of two cars to remain uncoupled and in a position where steam was escaping from the steam pipe while the weather was freezing, thus causing ice to form in and upon the couplers of the air hose and petitioner was unable to make a secure coupling of the air hose and they were caused to break apart, thus and thereby causing injury to petitioner.

Respondent denied that it was negligent.

Petitioner offered evidence showing the presence of ice on the coupler in question; that he knocked it off with a hammer and on coming back he saw steam escaping from the steam hose line and attempted to tighten the connection by hitting on the clamps with a hammer. That while he was so engaged the air hose coupling broke and struck him. Petitioner contended that this did not constitute a safe place to work because of failure to couple the lines when the cars were set out. Respondent offered evidence that there was no ice on the coupler as petitioner had removed it and that the ice did not cause the coupler to come apart.

The jury being unable to agree, the district court entered judgment in favor of defendant and dismissed petitioner's complaint on the merits. The United States Court of Appeals affirmed this action of the district court.

QUESTIONS.

1. Where the evidence shows a conflict in the testimony and two juries of reasonable men have failed to agree on the issue of negligence, may a district court or an appellate court make a finding of fact and inject its own finding into the case as the only reasonable finding that could be made by a jury?

2. Where one of the issues in the cause is whether or not a particular coupling mechanism may appear to be secure, but is not secure because of the presence of a foreign material (ice) in the coupling mechanism, is it proper for the trial court to withdraw from the jury demonstrative evidence, consisting of a similar type coupler, to demonstrate that the accident could have happened as plaintiff contends, that is that the presence of a foreign substance in the air hose coupling creates the hidden danger of a violent separation, as on the occasion of petitioner's injury?

3. Is it proper for a District Court to enter a judgment dismissing plaintiff's complaint on the merits where different and conflicting inferences are possible from the evidence and one of those inferences entitles plaintiff to recover?

4. May the trial or appellate court inject contributory negligence as a complete defense in a Federal Employers' Liability Act case by ruling, in effect, that even though defendant railroad was at fault in permitting an unsafe condition as petitioner charged, it was petitioner's duty to correct that condition so as to render it his own sole fault if he is hurt because of the existence of that unsafe condition?

5. May an appellate court or a district court disregard the law of a case as established in a former appeal of that same case?

STATEMENT.

Petitioner brought this action in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri under the Federal Employers' Liability Act, 45 U. S. C. A., Section 51.

Respondent's answer was a denial of negligence on its part.

The cause was tried three times. The first trial resulted in a hung jury. At the second trial the trial judge sustained Respondent's motion for a directed verdict at the close of petitioner's case. Petitioner appealed and the Court of Appeals for the Eighth Circuit reversed the trial court, remanding the case for another trial. On the occasion of the third trial, at the close of all of the evidence, Respondent moved for a directed verdict in its favor. The cause was submitted to the jury and upon their failure to agree they were discharged. Thereafter the District Court, on renewal of Respondent's motion for a directed verdict on June 3, 1955, entered judgment for the Respondent on the merits.

Petitioner appealed to the United States Court of Appeals and that Court affirmed the judgment.

The evidence showed, and the United States Court of Appeals found, the following facts:

On December 29, 1950, petitioner was in the employ of respondent as a car repairman and inspector. His duties included servicing the Wabash Railroad Company's passenger train "Bluebird" as part of the services furnished by respondent to the Wabash. Usually the Wabash Bluebird consisted of six cars but on the night in question an extra car had been cut in between the last two regular cars, then cut out of the train at the end of the run before

Petitioner came on duty. The regular cars were left coupled as to draft couplings, but the steam and air hose connections were left uncoupled. Usually the steam hose and air hose connections would be recoupled in such a situation. In fact, there was a company rule requiring steam to be kept on all equipment during cold weather, and it was cold on the occasion in question. All of the air and steam hose connections were connected except those between two cars mentioned, these being cars No. 1601 and No. 51. The air hose connection of No. 51 had a lump of ice on the coupler larger than a man's fist. Petitioner knocked this ice off with a hammer, but he could not be sure that he removed all of the ice, since he had only a hand battery lantern to work by, and there was no other light. The steam hose connection also had ice on it. This ice was caused by condensation of steam escaping from the open steam line. Petitioner made the couplings and continued on with checking the cars. He thought he had removed all of the ice because he was able to make the coupling. He blocked each car and when he got to the westernmost edge of the train he turned on the steam connection in the yard. On returning towards the eastern end of the train, he saw steam escaping between cars 1601 and 51, and hit on the steam hose connection to tighten it. This would be proper procedure. The defendant (respondent) offered some evidence that this might cause an otherwise secure coupling to break. While hitting the steam hose connection, the air hose connection broke, striking plaintiff and injuring him.

Two exhibits were offered of a coupling such as the one in use on the occasion in question. The respondent also offered in evidence certain statements bearing petitioner's signature and initials. Petitioner did not remember signing these statements. These statements conflicted in some particulars as to how this accident occurred. Respondent had offered evidence that a coupling properly made could

not come apart as petitioner stated, or if it did that it would do so because of being hit. There is also some testimony that a coupling could not be made if there was any foreign material in the coupling unit. The original exhibits of the couplings were marked with an "A" to indicate the air hose line and an "S" to indicate the steam hose line. Much of this testimony was given by a Mr. McCauley. This witness was recalled by petitioner and the following occurred (by Mr. Fredrickson for petitioner):

"Q. Is that correct? I would like to show you this air hose Mr. McCauley and ask you to look at that, please, particularly the head of it.

A. Yes, sir.

Q. Now, I believe on this one that you are holding, that the part where I have marked in chalk in both instances here, those grooves have to a large degree been filled in with metal?

A. Yes, sir.

Q. Is that not correct?

A. That is correct.

Q. And other than that it is just the same?

Mr. Ely: It is what?

Mr. Fredrickson: It is just the same as any other air hose coupling.

A. Yes, sir.

Q. Now, you take those, they will couple together, not quite so easily but they come down to where they are coupled together, is that not correct?

A. Yes, sir.

Q. And they are, in all respects they look like any coupling you would have, is that correct?

A. Yes, sir.

Q. And yet they will slide apart?

A. Yes, sir.

Q. In other words, anything, whether it be metal that is in here, ice or anything else, would break your tie that holds your coupler together, would it not?

A. It would prevent it from coupling properly.

Q. It would not prevent it from coupling properly.

A. Well, I mean——

Q. It would cause it to come apart very easily.

Mr. Ely: Do you mean if coupled properly?

Mr. Fredrickson: I beg pardon. He said it would couple properly a moment ago.

Q. (By Mr. Fredrickson) It goes together all right, doesn't it?

A. Well, it goes together all right, yes, but of course that would be considered defective.

Q. Well, that is not what I asked you.

A. If properly coupled, if it was defective.

Q. If there was any ice or anything down in there it will destroy your locking mechanism?

A. Yes, that is it.

Q. Whether it be any foreign substance that is in there.

A. That is correct" (T. 234-236).

Thereafter counsel for respondent cross-examined this witness about this particular locking mechanism. Then on the next day counsel for respondent moved that all of this testimony be stricken and it was ordered stricken by the Court (T. 303).

Upon appeal, the Circuit Court of Appeals affirmed the judgment. Petitioner filed his motion for rehearing which was denied and the mandate of that Court was filed on March 16, 1956.

BASIS OF OPINION OF THE UNITED STATES COURT OF APPEALS.

In the first decision by the Court of Appeals it is noted that there may be evidence of failure to supply the petitioner a safe place to work in that the respondent negli-

gently left these cars in such a state that ice could form on the couplings, and in failing to supply the petitioner with adequate means of removing said ice.

In its instant opinion that same Court said this would not be negligence as petitioner's duty was to remove that ice and to see that the cars were in good repair. The Court in its opinion further says that permitting ice to accumulate would not be the proximate cause of the injury, but would only be an act that would present the opportunity of injury being inflicted.

The Court further ruled that it was not error to strike the testimony concerning the welded coupling. This on the theory that there was no evidence to justify its admission into evidence and that it would not be proper because there was no showing that the coupling in question was in a similar condition to the welded coupling.

REASONS FOR GRANTING THE WRIT.

I.

In deciding that there is no evidence of negligence on the part of the defendant (respondent) the Court of Appeals has disregarded competent evidence and has weighed conflicting evidence and the inferences to be drawn therefrom; in so doing the Court has usurped the function of the jury and brought its opinion into conflict with controlling decisions of this Court in the following cases:

Lavender v. Kurn, 327 U. S. 645;
Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29;
Wilkerson v. McCarthy, 336 U. S. 53.

II.

In deciding that the injury was caused by the sole negligence of the petitioner the Court in its opinion goes on to say that any negligence of respondent, assuming there was ice in the coupler, was not actionable negligence has made negligence of petitioner which the jury could have found to be no more than contributory negligence or total defense in this cause contrary to the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-60.

III.

The Court erred in excluding evidence from which it could be inferred that the presence of ice in the locking mechanism of the air hose caused it to burst apart under pressure.

Teal v. Bilby, 123 U. S. 572;
Wilkinson v. Livingston, 45 F. (2d) 465 (8th Cir.).

PRAYER.

Wherefore, your petitioner prays that a writ of Certiorari be issued out of this Court directed to the United States Court of Appeals for the Eighth Circuit, commanding that Court to certify and send this Court a transcript of the record in the case entitled "Ferriel M. Barnett, Appellant v. Terminal Railroad Association of St. Louis, a Corporation, Appellee, No. 15,413," including the proceedings in the Court of Appeals to the end that the cause may be removed and determined by this Court and the judgment of the Court of Appeals reversed and this cause remanded.

SUMMARY OF ARGUMENT.

I.

In sustaining respondent's motion for a directed verdict where the evidence is conflicting and would support different inferences, the Court of Appeals for the Eighth Circuit has usurped the function of the jury and brings its decision into conflict with controlling decisions of this Court.

Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916;
Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29;
Wilkerson v. McCarthy, 336 U. S. 53.

II.

The opinion of the Court of Appeals for the Eighth Circuit erroneously injects contributory negligence as a defense in this case contrary to the provisions of the Federal Employers' Liability Act.

45 U. S. C. A., Sections 51 et seq.;
Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54, 87 L. Ed. 446.

III.

The Court erred in excluding from the case evidence that would tend to establish that ice in the locking mechanism of the air hose would cause it to burst apart under pressure, and this evidence should be considered in determining if the petitioner made a submissible case.

Teal v. Bilby, 323 U. S. 572;
Wilkinson v. Livingston, 45 F. (2d) 464 (8th Cir.).

IV.

The opinion of the Court of Appeals for the Eighth Circuit which is the subject of this petition, is in conflict with that Court's prior opinion on another appeal of this case.

Barnett v. T. & P. R. A., 200 F. 2d 893 (8th Cir.).

ARGUMENT.

I.

In sustaining respondent's motion for a directed verdict where the evidence is conflicting and would support different inferences, the Court of Appeals for the Eighth Circuit has usurped the function of the jury and brings its decision into conflict with controlling decisions of this Court.

There was substantial evidence to support the hypothesis that the respondent was negligent in the manner in which it set cars in its yards in cold weather with the air and steam lines disconnected so that ice formed on the air hose coupling causing it to break apart and to injure the plaintiff. The question of negligence is almost always one of fact. An exception is made if it can be said that the evidence and inferences to be drawn therefrom are such that all reasonable men must agree that there is no negligence. Here the very history of this case cries out more effectively than can any court that all reasonable minds can not agree that the evidence will support only one inference. Two juries of reasonable men disagreed and were discharged.

The rulings of this Court find full expression in the case of Lavender v. Kurn, 327 U. S. 645, 653, where it is said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative

facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard to disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable."

To a similar effect is the opinion in Wilkerson v. McCarthy, 336 U. S. 53, 61:

"But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances, and a jury should hold a master liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances bearing in mind that the standard of care must be commensurate to the dangers of the business."

It appears in this case that many effective arguments could be made pro and con on the issue of negligence, a jury could have found that considering the hazards to be met and all of the circumstances under which the work was required to be done that the employer was negligent in leaving the lines in question disconnected in violation of its own rule, and especially at a time when the weather caused escaping steam to form ice on the couplings. Petitioner had to try to remove this ice before he could do his work. Ice tends to be transparent. How could he know if he had removed all the ice? The demonstrative evidence which was unsuccessfully offered tends to show that just a little foreign matter in the grooves of the coupling render it dangerous.

The jury could also have found respondent negligent in failing to provide petitioner with adequate tools to meet the situation. He had only a hammer and a hand electric lantern as the means of removing the ice and the means of illuminating his efforts and inspecting the results thereof. Reference has been made in the pleadings and evidence to the tools available for removing the ice, the light available for inspection of the coupling before and after the ice was removed and for inspecting the coupling after it was made. There was a reasonable hypothesis of negligence and that issue is for a jury and not the Court.

II.

The opinion of the Court of Appeals for the Eighth Circuit erroneously injects contributory negligence as a defense in this case contrary to the provisions of the Federal Employers' Liability Act.

The Court of Appeals in its opinion filed says:

> "So in the instant case if there was any negligence on behalf of the defendant in failing to connect up the hose in controversy earlier than it did, that would not be the proximate cause but would simply furnish the opportunity for the infliction of injuries."

That Court then says if there was ice in the coupler, that was because plaintiff did not remove it, and his negligence in failing to do so would be the sole proximate cause of the accident.

We submit that there was substantial evidence from which a jury could infer that ice remained in the coupler, i. e., inside. If it negligently got there, then it was a jury issue as to petitioner's failure to remove it, and even if he were found negligent in this respect, such negligence would be no more than contributory negligence and could

not defeat plaintiff's right to recover under the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51 et seq., and this Court's decision in the case of Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54. The Court's theory that petitioner's hypothetical negligence would have been the sole cause of his injury was itself a jury question and not for the Court to decide.

III.

The Court erred in excluding from the case evidence that would tend to establish that ice in the locking mechanism of the air hose would cause it to burst apart under pressure, and this evidence should be considered in determining if the petitioner made a submissible case.

There was much evidence in this cause that a coupler could not be closed with any foreign material therein. Demonstration evidence is recognized and has a very distinct place in the trial of a cause. Counsel for the respondent knew that petitioner's counsel, Mr. Fredrickson, was using a different coupler from the one first introduced in evidence. The second coupler offered had a metal weld to simulate the presence of ice. Respondent cross-examined freely on the second coupler. Then the next day he moves to strike the evidence on the basis that the trial Court could take judicial notice of a fact contrary to that indicated by the demonstration (T. 301, 302; 235-236). The trial Court adopted this paradox and excluded the demonstrative evidence. Not only was this an unjustified application of the doctrine of judicial notice, but it ignored that rule of practice which required respondent's counsel to make his objection to the evidence at the first opportunity. Here, respondent waived his objection. This evidence shows that a coupling may appear secure, but actually will come apart rather easily, i. e., the locking mechanism may be interfered with and not be observable. From this evi-

dence, the jury may infer that ice was in the coupler and interfered with its proper working. We submit the evidence was proper and should not have been stricken and, if improper, any objection to it was waived by defendant.

IV.

The opinion of the Court of Appeals, which is the subject of this petition, is in conflict with that Court's prior opinion in this case reported in 200 F. (2d) 893.

After one mistrial, caused by the failure of the jury to agree, this case was tried a second time and disposed of on a motion for directed verdict sustained at the close of plaintiff's evidence. Plaintiff (petitioner here) appealed and was successful in getting the Court of Appeals for the Eighth Circuit to remand the case for a new trial. The opinion rendered on that occasion will be found in the Appendix hereto, and was reported in 200 F. (2d) 893. The opinion points out several issues of defendant's (respondent's) negligence which appear to inhere in the record (App., p. 33). The cause was then tried a third time on a theory reflected in this petition and encompassed within those pointed out by the Court of Appeals. Nevertheless, upon the failure of the jury to arrive at a verdict, the trial Court again gave judgment for defendant-respondent and now, on the second appeal, the Court of Appeals has sustained the trial Court. The last opinion has not yet been reported. It is set out beginning on page 16 of the Appendix hereto. The two opinions are apparently in conflict. First, it is suggested that, on the record, a certain ground of negligence presents a jury issue; then, after submitting that issue, the Court rules that there is no such issue in the case. The cause has twice been submitted to a jury, but no verdict has ever been returned. Can any reasonable person conclude, then, there is no justiciable issue of fact? We respectfully suggest that the second

opinion of the Court of Appeals is therefore unsound and that it is worthy of this Court's attention because of the conflict with the previous opinion.

CONCLUSION.

Petitioner respectfully submits that, for reasons herein stated and errors illustrated, this Court should grant its writ of certiorari and after hearing reverse this cause and remand it for a new trial.

Respectfully submitted,

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ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

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SUPREME COURT OF THE UNITED STATES.

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Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

In the
UNITED STATES DISTRICT COURT,
Eastern Division of the Eastern Judicial
District of Missouri.

AMENDED COMPLAINT.

1. This action arises under Sections 1 to 46, inclusive, and Sections 51 to 60, inclusive, of Title 45 of the U. S. Code.

2. The Defendant, Terminal Railroad Association of St. Louis, is now, and was at all times herein mentioned, a corporation duly organized and existing according to law, and engaged in business as a common carrier by railroad in the City of St. Louis and State of Missouri.

3. That at all times hereinafter mentioned, Plaintiff was employed by Defendant as a car-repairman in Defendant's Rankin Coach Yard in St. Louis, and both Plaintiff and Defendant were engaged in interstate commerce.

4. That on December 29, 1950, Plaintiff was engaged in the course of his employment by Defendant in inspecting brake shoes and making an air test on passenger cars of the Wabash Railroad Company, which other employees of the Defendant had previously placed in said coach yard and were subsequently to remove therefrom; and that defendant negligently allowed and permitted the air brake hose and the steam pipe on each of two of said cars to remain uncoupled and in a position where steam was escaping from the steam pipe between said cars at a time when the weather was below freezing and as a direct result of such negligence ice formed in and upon the couplers of said air hoses and wholly or partly as a result thereof, Plaintiff was unable to make a secure coupling of said air hoses by reason of the existence of ice in and on such coupling, so that they burst apart, struck, and injured Plaintiff, as hereinafter stated.

5. Plaintiff's right knee, leg, back, spine and sacroiliac joint and all the bones, tissues, tendons, discs, cartilages, ligaments, nerves, membranes, arteries, veins and blood vessels were torn, mashed, bruised, ruptured, broken, fractured, compressed, irritated, paralyzed, and the function of all of said parts was seriously impaired and arthritis in Plaintiff's spine and right knee was aggravated; Plain-

tiff has been caused to suffer loss of hearing and dizzy spells; that all of said injuries have caused and will in the future continue to cause Plaintiff to suffer pain of body and mind; that Plaintiff has been caused to lose his earnings as a car-repairman; that Plaintiff is totally and permanently disabled from following any gainful occupation and all of the aforesaid injuries are permanent and disabling; that Plaintiff has been caused to incur medical expenses by reason thereof; all to Plaintiff's damage in the sum of One Hundred Thousand ($100,000.00) Dollars, for which sum Plaintiff prays judgment, together with his costs.

Haley, Fredrickson & Caruthers,
St. Louis, Missouri,
Attorneys for Plaintiff.

In the
UNITED STATES DISTRICT COURT.

ANSWER.

Terminal Railroad Association of St. Louis, defendant in above entitled cause, for its answer to Plaintiff's Amended Complaint filed September 24, 1954, states:

1. Paragraph 1 of plaintiff's amended petition requires no answer.

2. Defendant admits its corporate existence as alleged in paragraph 2 of plaintiff's amended complaint and denies each and every other allegation therein contained.

3. Defendant admits that at the times mentioned in plaintiff's amended complaint plaintiff was employed by defendant as a car repairman, and denies each and every other allegation in paragraph 3 of said complaint.

4. Defendant denies each and every allegation contained in paragraph 4 of plaintiff's amended complaint.

5. Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 5 of plaintiff's amended complaint.

Wherefore, having fully answered plaintiff's amended complaint, defendant prays to be hence dismissed with its costs.

6. Defendant states that whatever injuries plaintiff sustained on the occasion mentioned in his amended complaint, and whatever conditions and consequences were occasioned thereby, resulted solely from, or were caused by, plaintiff's own negligence contributing directly and proximately thereto.

Wherefore, having again fully answered plaintiff's amended complaint, defendant prays to be hence dismissed with its costs.

Wayne Ely,
St. Louis, Missouri,
Attorney for Defendant.

ABSTRACT OF TESTIMONY.

The plaintiff, Ferriel M. Barnett, of Newburg, Missouri, offered the following evidence in his own behalf:

That at the time of the accident he was 49 years old and had been employed by the defendant for 18 months (T. 53). His work required a good deal of stooping, walking, heavy lifting and general physical exertion (T. 119-121). In the accident he received a broken knee and some back injury (T. 87, 88, 90, 91, 220, 221), and he has been unable to hold a steady job since the accident (T. 121-127).

On the morning of December 29, 1950, plaintiff went to work at or about 12:30 A. M. (T. 55). His first job was to replace worn brake shoes and to make minor repairs on the Wabash Blue Bird, Train No. 24, and check the equipment for air and steam leaks (T. 56). The train usually consists of six cars but on the night of December 28, 1950, it had an extra car between the dining car No. 51 and the observation car No. 1601 (T. 12). After arriving at the station, the extra car was cut out and the remaining six cars were put on track No. 9 in defendant's Jefferson Avenue yards (T. 12, 13, 33, 56). This track runs generally east and west and there is a slight slope of two percent (T. 13, 32, 33, 56). The train was set on the track with the brakes in a locked on position (T. 32, 33) with the observation car at the easternmost end and the dining car immediately west of it (T. 13). All cars were coupled together while in operation (T. 59). All steam and air hose connections were made between the cars except the dining and observation cars (T. 60), even though there existed a rule that in cold weather steam be kept on passenger equipment at all times (T. 13, 14). This night was very cold (T. 60), about 20 degrees above zero (T. 55).

As a general rule, when one such as plaintiff goes to work all steam and air connections between the cars are

already made (T. 19, 20, 60). There was, however, some evidence that it was plaintiff's job to make these connections when they had not otherwise been made (T. 30, 136).

Plaintiff started his work by placing blocks under the wheels of the easternmost end of the easternmost car, or the observation car (T. 57). It was necessary to block the wheels to keep the train down the grade on track No. 9 (T. 57) when the brakes were released, which, in turn, was necessary in order to check the brake shoes (T. 56). After blocking the wheels of the observation car he proceeded westwardly and found that the air hoses and steam lines between the observation and dining cars were not connected (T. 57, 58, 60). In addition, he found that the coupling heads of both the air hose and steam line of car No. 1601 were covered with an ice ball about the size of a man's fist (T. 65, 68, 160). The coupling heads to the air hoses were hanging in close proximity to the open steam line (T. 70). The ice thereon was the result of condensation discharge from the open steam line (T. 66, 160). It was dark and plaintiff had only a hand battery lantern to work by (T. 65). There was no other light in the yard or on the train (T. 65). Plaintiff put the lantern on the car coupling and knocked the ice from the unconnected air hoses and hose couplings with a hammer (T. 71). He then made the connection (T. 73). He could not say positively that he knocked all the ice off as he did not afterwards closely inspect the coupling mechanism, but he thought so, as the coupling mechanism went together all right and to all external appearances the coupling appeared to be proper (T. 73, 74, 137, 138, 141-143, 160, 212). The plaintiff had no difficulty in making the connection as there was sufficient slack in the air hoses and they were not stretched tight and as all of the slack between the cars had not pulled out of the drawbars (T. 159).

After connecting the steam and air hoses between the two cars, he proceeded westwardly along the train block-

ing each car as he went (T. 68). When he arrived at the westernmost end or the head end of the train he hooked the steam line from the yard to the train so that the whole train would have steam on it (T. 61). He then went to the easternmost or rear end of the train, blocking cars as he went, and hooked the air brake hose of the train to the air line in the yards and turned it on (T. 62, 63). The purpose of this air was to operate or release the train brakes (T. 62). After that and while still at the easternmost end of the train, he drained the train of steam condensation by means of an angle cock on the train steam lines (T. 63). He shut off the angle cock and proceeded back westwardly along the right side of the train checking brake shoes as he went (T. 63). The brakes at this time were in a released position (T. 64).

As he passed the connection between the observation car and the dining car he observed a leak in the steam hose connection between these two cars (T. 65). He stepped in between the cars, holding his lantern in his left hand and pressing it against the observation car, he took his hammer in his right hand and attempted to tighten the steam line coupling, which was leaking, by hitting on the locks of the connection (T. 106, 107). It was proper procedure to try and tighten a steam leak and a steam hose connection by knocking on the clamps with a hammer (T. 36). The plaintiff could not see too well, as his only light was the hand lantern and steam was blowing out of the leaking coupling, making vision difficult (T. 56, 107, 162). While he was thus working on the steam line connection, the air hose connection separated and struck the plaintiff on the right knee (T. 107, 108). Plaintiff was dazed by the blow and remembers only when he found himself on his back across a rail backwards from his previous position (T. 108).

Mr. McCauley, plaintiff's gang leader foreman (T. 31), was working at the east end of the observation car at the

time plaintiff was injured at the west end of the observation car. He heard the plaintiff, Barnett, holler and at the same time heard the train brakes go into emergency (T. 20). At the time of the injury the brakes went into a full on-position (T. 21). McCauley went to where the plaintiff was injured, noticed that the air hoses were separated and that there was a small leak in the steam heat connection between the cars (T. 34). Shortly thereafter, plaintiff was taken to the Missouri Pacific Hospital (T. 110).

The defendant introduced evidence that there had been a leak in the air hose connection (T. 259, 268), and that the plaintiff had in fact attempted to correct this by hitting on it with a hammer (T. 268). In cross-examining plaintiff, the defendant introduced plaintiff's prior statements to the effect that there had been an air leak and that he had attempted to correct it by hitting on the air hose connection with a hammer. These were in a statement to defendant's Claim Agent Bittle and from testimony at the two prior trials. Plaintiff did not recall making any such statements (T. 148, 149, 164, 171, 172, 197, 198, 199), nor did he remember making a statement to Bittle or at the previous two trials that he did not know whether he hit the air hose coupling with a hammer (T. 192, 197, 198, 199, 205, 206, 207). He did not remember making any statement at the prior two trials that a sudden jerk of the observation car when the brakes were released was the cause of the hoses separating (T. 186, 187, 191).

McCauley did not remember plaintiff stating to him that plaintiff had struck the air hose coupling with a hammer (T. 259, 260, 262, 266). Plaintiff does not remember making any statement to McCauley on the cause of the accident (T. 168, 169). McCauley, however, recalls a conversation had just previous to his testimony between himself, Mr. Martin, Mr. Froehlich, Mr. Schimmers, and coun-

sel for the defendant, in which he was asked whether or not plaintiff had hit the air hose with a hammer, the witness at the time answering "yes" (T. 266, 267).

Plaintiff introduced Exhibits A, B and C, which are photographs showing the air and steam connections and the hoses which are customarily found on passenger equipment (T. 8). Exhibit A shows the air and steam hoses disconnected (T. 9). Exhibit B shows the disconnected lines as they appear when two cars are sitting together (T. 9). Exhibit C shows the connection between two cars after made (T. 9). On these exhibits the inked-in letter "A" indicates air hoses and the letter "S" indicates the steam hose (T. 36). The line involved in this case is the one marked with the letter "A." The remaining unmarked line, which is not here involved, is known as the train signal line and is also an air line (T. 39, 40).

McCauley, called as a witness for both plaintiff and defendant, had worked as a Car Inspector for the Terminal Railroad for eight years (T. 4, 5). He had some 30 years' experience with air hose couplings and brakes (T. 26). He testified to the working of the air brakes, the locking mechanism of the air hose coupling and the manner in which air hoses hung between connected coupled cars. To release the brakes on passenger equipment it is necessary to introduce air pressure into the train air brake hose line. To apply the brakes it is necessary to reduce the amount of air pressure in the line (T. 6). Plaintiff had this witness identify two air hoses which he identified as being those usually found on passenger train equipment (T. 9, 10). The witness explained the locking mechanism of the air hose coupling heads. On the under side of each head of the air hose coupling there exists a small stop pin, which keeps the hose from falling through in a vertical direction after they have once been connected. When the train is operating on the road the heads of the coupling rest against the stop pin, thus keeping the heads from

separating (T. 16). On each head of the coupling end of the air hose at the outermost extension exists a protrusion called a "lip" on which there is a tongue and groove arrangement. As the hoses are coupled together these tongue and groove arrangements mesh with a similar arrangement found on the back side of the coupling head, thus keeping the hoses from separating in a lateral plane (T. 17). The only way a hose can be separated when once properly put together and locked is to lift it to an almost level position so that the two locking mechanisms disengage (T. 18, 23). If, however, the tongue and groove arrangement were destroyed by wearing or some other method, the hose connection would be apt to separate under pressure (T. 218, 219, 223).

When air hoses are connected up between cars there is a certain amount of slack in them, allowing them to bounce around, to take the rough riding, when the train is in operation. The slack keeps the locking mechanism in place and allows the hose to swing around without separating (T. 10, 11). If the drawbars of the train are in first-class shape, and there is little wear in them so that there is very little slack action or play in the drawbars, with all of the slack pulled out of the drawbars there will remain a certain amount of slack in the air hoses so that the train may operate on the road without the hoses separating (T. 42, 43). The cars involved in this train, the Blue Bird, were relatively new. There was little or no wearing in the drawbars so that the slack action was very slight (T. 43, 44, 269, 270). Thus, there would be very little stretching of the air hoses when connected (T. 43). Under these conditions, with the air hoses properly connected, and with the operating amount of slack in them, if one were to hit the air hoses with a hammer the hoses would not separate (T. 44). An inspection of the air hoses here involved by several persons at varying periods after the accident revealed that the hoses were mechanically perfect

and functioned as they should (T. 41, 269, 272, 281, 283, 284).

The plaintiff admitted on cross-examination that the statement, Defendant's Exhibit 1, had plaintiff's initials on seven of the eight pages (T. 50, 51), and that the statement was signed on the eighth page in the plaintiff's handwriting (T. 151). Plaintiff did not remember Mr. Bittle coming to the hospital and taking such a statement from him (T. 149, 151, 168, 169, 171, 172). Plaintiff did not remember giving any testimony at the first trial to the effect that he had given a statement of this sort (T. 177-180). Defendant put Mr. Bittle on the stand and had him identify the above-mentioned statement as the one taken by the witness from the plaintiff on January 9, 1951, at the Missouri Pacific Employees' Hospital (T. 239, 240, 241). The witness testified that the plaintiff had initialed each and every page and signed the following one after reading it (T. 241).

Defendant introduced into evidence a photostatic copy of plaintiff's claim for disability benefits to the Providence Life and Casualty Insurance Company (T. 249). The claim is as follows: Policy No. 139-1466; employed by Terminal RR; name of foreman and superintendent, L. W. Martin; employed as Car Man; your occupation, it says, Car Man; (1) Accident occurred, 12/29; date last worked, 12/29/50, a. m. 1:30; (2) State what injury or circumstance caused your disability, it is written in there, broken right knee cap; (3) Refers to sickness, not answered; (4) If injury, explain fully how and where accident occurred, 12/29, 1:30 a. m., making air hose connection, connection parted and air hose struck me on knee; signed as the witness said by himself (T. 249).

The plaintiff admitted making this claim (T. 209) and that his signature appears thereon (T. 209, 210). Defendant also introduced into evidence plaintiff's original peti-

tion, Paragraphs 5 and 6 (T. 250-254), and plaintiff's second amended petition (T. 255).

At the close of the plaintiff's case plaintiff recalled witness McCauley to the stand and the following occurred:

Counsel handed the witness an air hose and told him to carefully consider the head and notice that at the tongue and groove arrangement the groove had been largely filled in with a metal (T. 234):

"Q. Now I believe on this one that you are holding that the part where I have marked in chalk in both instances here those grooves have to a large degree been filled in with metal?

"A. Yes, sir.

"Q. Is that not correct?

"A. That is correct.

"Q. And other than that it is just the same? (T. 234.)

"Mr. Ely: It is what?

"Mr. Fredrickson: It is just the same as any other air hose coupling.

"Q. (By Mr. Fredrickson) That there is a weld in there of metal, is that correct?

"A. Yes, sir" (T. 235).

The witness then stated that even with the weld placed in the tongue and groove arrangement, the air hoses would still work; in every respect the coupling then made looked as if it was proper and correct; yet the coupling would readily slide apart (T. 235). If there were ice or any foreign substance in the tongue and groove arrangement it would destroy the locking mechanism (T. 236).

Counsel for defendant then cross-examined:

"Q. Now, if they are put together like Mr. Fredrickson shows here a while ago then that would make a

leak in the air hose, wouldn't it, if you put on pressure?

"A. No, sir, the way he had them just now would not make a leak in the air hose, but if those are obstructed like he showed being tapped slightly would cause them to bust apart.

"Q. (By the Court) It would or would not?

"A. It would.

"Q. (By Mr. Ely) It would. If they are put together like he showed you there, then to tap with a hammer, if it had pressure in there would cause them to break apart?

"A. If this one head was obstructed or defective, it would cause that.

"Q. That is if they were put together like he had them put together a while ago?

"A. A while ago" (T. 237).

The witness then went on to testify that the heads of the air hoses as demonstrated by plaintiff's counsel on direct examination put them in a triggered condition and they would go off at the slightest little jar or happening (T. 238).

Defendant's counsel then recross-examined:

"Q. And the way he had it put together then was not properly put together, was it?

"A. It was properly put together, but it was defected.

"Q. It was not locked?

"A. It could not be locked under the circumstances.

"Q. This is not the same hose, of course, you had that night?

"A. No.

"Q. Is this a defective coupling on this hose here?

"A. That would be a defective coupling.

"Mr. Fredrickson: Sure.

"Mr. Ely: That is all.

"Mr. Fredrickson: I have no further questions" (T. 238).

A day after the close of the entire case, a proceeding was held in the judge's chambers in which defendant for the first time questioned the above quoted evidence (T. 287, 288, 289). The case was reopened by stipulation of counsel (T. 294, 295) and Mr. Fredrickson, counsel for plaintiff, was put on the stand and was examined about the defective air hose used by McCauley in the above testimony. At the close of this examination, defendant for the first time objected to the demonstration (T. 301, 302):

> "Mr. Ely: Now, if Your Honor please, I am going to ask Your Honor to withdraw the welded air hose from consideration of the jury, withdraw it from evidence in the case and to instruct the jury to disregard it entirely and to entirely disregard any demonstration that was made with it because there is no evidence in this case that would justify its admission into evidence. There is no evidence in this case that the hose which was involved in this accident had any such weld in it, or had any ice in there where the weld is and because Your Honor would judicially notice that the presence of ice of the thickness of this weld would not have the same effect on preventing a coupling as this putting of the metal in there is. I will ask Your Honor to take that away from the jury's consideration."

The objection was sustained as follows (T. 303):

> "The Court: The jury is instructed to disregard everything considering that welded——
>
> "Mr. Ely: Air coupling.
>
> "The Court: Air coupling as exhibited to them when the witness McCauley on the witness stand the last

time, it will be withdrawn from your consideration and you will disregard it.

"Mr. Ely: That is all, Your Honor."

This cause was submited to the jury and upon their failure to agree, the jury was discharged.

During the trial of the cause the defendant had moved for a directed verdict in its favor. The Court reserved its ruling and thereafter on June 3, 1955, made the following order:

ORDER OF COURT.

The Court, having before it the defendant's motion for judgment in accordance with its motion for directed verdict, and having examined said motion, studied the briefs of the parties, and being fully advised in the premises, Doth Order that said motion be and the same is hereby sustained and that judgment be entered for defendant, at plaintiff's costs.

Dated this 3rd day of June, 1955.

(Signed) Geo. H. Moore,
United States District Judge.

NOTICE OF APPEAL.

Notice is hereby given that Ferriel M. Barnett, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the 8th Circuit, from the order sustaining Defendant's motion for a directed verdict and from the judgment entered for defendant in this action on the 3rd day of June, 1955.

Haley, Fredrickson, & Caruthers,
By Edward Fredrickson,
St. Louis, Missouri,
Attorneys for Plaintiff.

The cause was argued in the United States Court of Appeals for the Eighth Circuit and the following opinion was handed down:

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,413.

Ferriel M. Barnett, Appellant,
vs.
Terminal Railroad Association of St. Louis, a Corporation, Appellee.

Appeal from the District Court of the United State for the Eastern District of Missouri.

[January 17, 1956.]

Robert W. Gilcrest (Haley, Fredrickson & Caruthers were with him on the brief), for Appellant.

Wayne Ely for Appellee.

Before Gardner, Chief Judge, and Woodrough and Vogel, Circuit Judges.

Gardner, Chief Judge.

This was an action brought by appellant to recover damages for injuries suffered by him while in the employ of appellee. We shall refer to appellant as plaintiff and to appellee as defendant. The defendant is a railway corpora-

tion operating as a common carrier in interstate commerce and at all times pertinent to this action was the owner and operator of the terminal facilities at St. Louis, Missouri, for all common carriers operating into, through or out of that city.

At the time of receiving his injuries plaintiff was employed by the defendant as a car inspector and repairman in its railroad yards at St. Louis, Missouri. The case has been tried three times. On the third and last trial plaintiff filed an amended complaint which in substance charged as acts of negligence as the basis for recovery that on December 29, 1950, plaintiff was engaged in the course of his employment by defendant in inspecting brake shoes and making an air test on passenger cars of the Wabash Railroad Company which other employees of the defendant had previously placed in the coach yard and were subsequently to remove and that the defendant negligently allowed and permitted the air brake hose and the steam pipe on each of two of said cars to remain uncoupled and in a position where steam was escaping from the steam pipe between the cars at a time when the weather was below freezing and as a direct result of such negligence ice formed in and upon the couplers of the air hose and wholly or partly as a result thereof plaintiff was unable to make a secure coupling of the air hose by reason of the existence of ice in and on such coupling so that they burst apart, struck and injured plaintiff. This complaint was an amended and substituted complaint in that it did not by reference or otherwise embody the allegations of the complaint as originally filed. The defendant by its answer denied each and every allegation of the amended complaint except as admitted and it admitted the jurisdictional allegations, admitted that at the time of receiving his injuries plaintiff was in its employ as a car repairman but denied that it was guilty of any negligence and affirmatively pleaded that whatever injuries plaintiff sustained on the occasion mentioned in his

amended complaint resulted solely from or were caused by plaintiff's own negligence.

At the time of the accident resulting in plaintiff's injuries plaintiff was an experienced machinist having been employed by the St. Louis-San Francisco Railway Company for thirty years and by the defendant for some eighteen months. On the day of the accident he began working at 12:30 a. m. His first job was to replace worn brake shoes and to make minor repairs on the Wabash Blue Bird passenger train and check the equipment for air and steam leaks. This Blue Bird train when it arrived in the yards at St. Louis was carrying an extra car between the dining car and the observation car. Prior to the time plaintiff inspected the train this extra car had been cut out and the cars had been recoupled. The hose connecting the air brake line and the hose connecting the steam line had, however, not been connected and there was escaping steam from the disconnected end of the steam line hose. The temperature stood at about twenty degrees above zero and there was ice accumulated on the coupling heads of each of these disconnected hose. Plaintiff in discharge of his duty as a car inspector and repairman entered between the cars where the hose were disconnected and exposed and with his hammer knocked the ice off the head of each of these exposed hose and connected each with the hose of the car immediately ahead of it. After connecting the steam hose and air brake hose between the two cars he proceeded westwardly along the train blocking each car as he went and when he arrived at the westernmost end or the head end of the train he hooked the steam line from the yard to the train so that the whole train would have steam on it. He then went to the easternmost or rear end of the train blocking cars as he went and hooked the air brake hose of the train to the air line in the yards and turned on 110 pounds of air pressure. He then returned to the space between the dining and observation car and observed a leak in the steam hose connec-

tion between these two cars. While he was attempting to tighten the steam line coupling which was leaking the air brake hose connection separated striking him on the knee.

The facts will be further developed in the course of this opinion. At the close of all the evidence defendant moved for a directed verdict on the following grounds: (1) That the evidence was not sufficient to sustain any allegation of plaintiff's complaint against defendant; (2) That the evidence fails to establish any violation of the Safety Appliance Act; (3) That the evidence fails to establish that the air hose coupling came apart by reason of any negligence on the part of defendant; (4) That the evidence proves that the air hose coupling came apart solely by reason of plaintiff's negligence; and (5) That the evidence proves that plaintiff failed to put the air hose coupling together properly and securely and that he knocked it apart with a hammer. The court deferred passing on the motion for a directed verdict and sent the case to the jury. The instructions are not to be found in the record before us and, hence, will be assumed to be correct in every respect. The jury failed to agree and was in due course discharged. Thereafter defendant made a motion for judgment in accordance with its motion for directed verdict. The court granted defendant's motion and entered judgment dismissing plaintiff's complaint on its merits and from the judgment so entered plaintiff prosecutes this appeal seeking reversal on substantially the following grounds: (1) The court erred in directing a verdict for the defendant and entering judgment for the defendant and dismissing plaintiff's complaint upon its merits. There was substantial evidence to support the hypothesis that defendant negligently set cars in its yards in cold weather with the air and steam lines disconnected so that ice formed on the air brake hose coupling causing it to burst apart and injure the plaintiff; and (2) The court erroneously excluded from the case certain evidence adduced by plaintiff and establishing that ice in the

locking mecha ism of the air brake hose would cause it to burst apart un ler pressure.

We shall fir t consider the action of the court in withdrawing from he jury's consideration a piece of hose and testimony wit reference thereto, the hose not having been introduced in vidence. In the course of the trial plaintiff called one Mc auley as a witness who testified with reference to the tw pieces of hose that had been introduced in evidence. He testified with reference to these hose, using them by way o illustration, that the hose was in two parts, each part bein equipped with a "head", with a "lip" on one head and groove on the other and the coupler of the hose was lock d together by fitting the lip into the groove. Plaintiff's cou sel marked the lip and groove of the coupler with chalk an the witness put them together and explained to the jury tha the locking of the coupler by fitting the lip into the groov would prevent the heads from pulling apart on lateral mo ement and further testified that if the coupler "was wor to the point that there was no tongue-and-groove left, o if the head of the hose is spread apart in some way, th n it would pull apart." After having been excused the w tness was recalled as plaintiff's last witness. When recalle counsel for plaintiff produced a piece of hose similar in ap earance to the two pieces of hose that had been introduc d in evidence and interrogated the witness with referenc thereto. He did not announce to the court nor to opposi g counsel that the hose so produced was not one of the pie es of hose already admitted in evidence. Ordinarily the nly testimony admissible with reference to this piece of ose would have been testimony for the purpose of layin a foundation for its admission in evidence. It is elementa y that a witness may not be interrogated with reference to a physical exhibit which has not been admitted in evidence a d it is perfectly manifest on the record that neither the c urt nor opposing counsel knew that this so-called exhibi had not been previously admitted in evidence.

This physical exhibit though entirely foreign to the record was exhibited to the witness and to the jury and it was shown that there was in the groove an obstruction consisting of certain metal and the witness was interrogated with reference to the effect the presence of such a substance might have in making a secure coupling. Following the closing of the testimony counsel for defendant in the court's chambers made known to the court that this piece of hose was not one of the pieces that had been introduced in evidence and contended that it had been improperly used for demonstration purposes. The case was thereupon reopened and defendant's motion to strike all evidence that had been introduced with reference to this piece of hose was sustained. Plaintiff did not attempt to reoffer any part of the testimony so stricken. In support of its motion to withdraw the exhibit from consideration of the jury and to strike the testimony with reference thereto counsel for plaintiff was called as a witness and, among other things, testified that when he first called Mr. McCauley to the stand he made use of two certain couplers or two pieces of air hose in making certain demonstrations and that when he called Mr. McCauley back to the stand he produced one of those two original pieces and a third and different piece of air hose which he used for another demonstration; that the third piece of air hose had not previously been used in the case; that when he produced the third hose he did not announce that it was a different one; that the flange on the lip of the third air hose had been filled in with metal at his direction; that before using it he did not advise the court nor opposing counsel that it was a different air hose from the one he had been using; that he picked it up from the floor under the table and that "I did not make any statement to you or His Honor, or to Mr. McCauley or to the jury, or anyone, that I have a third air hose here"; that in having the lip of one connection filled with metal, "I acted upon my own suggestion." The locking mechanism in the third piece of hose had been so altered by inserting a foreign piece of

metal therein as to render it ineffective and wholly unlike the actual condition of a normal locking mechanism. We think the court on its own motion would certainly have been warranted in taking the action which it did. The third piece of hose in its altered condition would certainly be deceptive and misleading. 32 C. J. S., Evidence, Sec. 607, p. 457. The evidence was not properly admissible but this was not made to appear until subsequent to the time it was offered and in such circumstances it was proper upon motion subsequently made to strike it from the record. **Specht v. Howard**, 83 U. S. 348.

To entitle a plaintiff to recover in an action brought under the provisions of the Federal Employers' Liability Act the burden of proof is upon him to prove the carrier guilty of negligence and that such negligence was the proximate cause in whole or in part of his injuries. **Wolfe v. Henwood**, 8 Cir., 162 F. 2d 998; **Tennant v. Peoria & P. U. Ry. Co.**, 321 U. S. 29; **Brady v. Southern Ry. Co.**, 320 U. S. 476. It was the theory of the plaintiff on this third trial that the coupling of the air brake hose, although apparently made, parted because of the presence of ice on the inside of the coupler. In this connection it is to be observed that at two previous trials no such contention was urged. On the first trial he attributed the separation of the coupling to a sudden jerk of the train. In his signed statement made at the hospital following the accident he said that the air hose coupling came apart when he tapped it with a hammer and it was not until the third trial that any claim of negligence was based on the fact that the defendant in removing the car that had been transported between the observation and dining cars had negligently failed to connect the air brake hose and the steam hose with the car immediately in front of it. Plaintiff admits in his testimony that as a car inspector and repairman it was his duty to remove the ice that had accumulated on the coupling ends of the steam hose and the air brake hose and he testified that in dis-

charge of this duty he did remove this ice. Touching this phase of the case he, among other things, testified on direct examination that before he coupled the air brake hose together there was ice on the coupling that "was piled up there, kind of mushroom-like * * * right on that end there where the connection is"; that the pile of ice was "as big as your fist, or bigger," and "covered that head on the air hose"; that he took his hammer and knocked it off and hooked them together; that he had his hammer in his right hand and a lantern in his left hand and that he lay the lantern on the side of the car to keep from hitting it with the hose; that he took hold of the hose and hit it with his hammer about twice, "just enough to knock the ice off of it"; and that he coupled the air hose together and "beat the ice off the steam heat line" and hooked it together. On cross-examination, among other things, he testified that he knocked the ice off; that he didn't know for sure whether he knocked it all off because he didn't inspect it but just placed the couplers together; that it was his job to knock the ice off and that "You have to knock it off to make a coupling if you got ice on"; that when he put the couplings together "they went down and locked, just like they usually do, routine work, work every night on it. * * * they buckled and dropped down like that there, that is what we go by"; that the ice which he knocked off had formed on one coupler head from the condensation which came from the steam line but that he knocked it off with his hammer; that after he knocked the ice off and coupled the hose he "just picked it up and hit it like that there and laced them together and they went together all right; that there wasn't anything he could notice to keep them from going together; that the couplers "would not go plumb down together if there was any ice in here," and that when he put them together he did not notice anything wrong with them; that there is an interlocking device consisting of a groove on one coupler head and a lock washer on the other; that the groove or flange is about a quarter inch deep and

that the lock washer fits into it; that he thought it coupled all right and that if there had been anything in there such as ice or anything else it could not have gone together and coupled. The steam or moisture which condensed on this coupler came from the steam line hose. There was no moisture passing through this air brake hose. After the ice had been removed from the couplers and the coupling had been made plaintiff turned on 110 pounds of air pressure to pass through this air brake hose coupler. When he returned to the couplers in question it was not claimed that he noted anything wrong with the air brake hose coupler but that the steam line hose coupler was leaking and it was in connection with his attempt to cure the steam hose leak that the air brake hose coupler burst apart. In this connection it is to be noted that plaintiff in his written statement as to how the accident occurred stated that the air hose came apart after he struck it with his hammer. It was not until the third trial of this case that he testified that it came apart when he struck the steam hose with his hammer. It is also to be noted in this connection that plaintiff alone testified as to the presence of ice on these hose couplers and as to the manner in which the accident is alleged to have happened. Such of his statements and testimony as is against his interest is presumed to be true and in these circumstances the rule as to directing a verdict may be stated as follows: Where a party's own testimony, if true, would defeat his right to a verdict, and such statements are not modified or explained, a verdict may be directed against him. **Harlow v. Leclair**, N. H., 136 A. 128; **Nicolai-Neppach Co. v. Smith**, Ore., 58 P. 2d 1016; **Mandell v. Dodge-Freedman Poultry Co.**, N. H., 45 A. 2d 577. There was no evidence whatever that there was any ice on the interior of this coupler and no testimony from which a jury could reasonably infer that the hose burst or came apart because of the presence of ice in the interior of the coupler. Such inference could be based only upon conjecture, possibility, speculation or guess. In such circum-

stances it cannot be said that there is substantial evidence sustaining plaintiff's contention and, hence, as a matter of law plaintiff was not entitled to recover. **Wilkerson v. McCarthy,** 336 U. S. 53; **Moore v. Chesapeake & O. R. Co.,** 340 U. S. 573; **Penna. R. Co. v. Chamberlain,** 288 U. S. 333.

But we think the evidence is insufficient to sustain a verdict for plaintiff for another reason. This plaintiff was according to his testimony a car inspector and repairman. As such it was his duty to make such repairs on these hose as was necessary to allow them to couple safely. This mechanism, it may be said, was in bad repair when he went on duty and it was his job, and his alone, to make the necessary repairs. There is no claim that during the time he was making the repairs the defendant failed to furnish him with proper tools or failed to furnish him with a reasonably safe place to make the repairs or actively did anything that resulted in his injuries. A mechanic could not, we think, be heard to complain that it was the negligence of his employer that caused the mechanism to get out of repair. It might be said that there would be no occasion for the mechanic to perform any duty if the mechanism were not out of repair. By analogy we may consider the case of an automobile mechanic. The owner of a car through his own negligence has had a collision resulting in damage to the car. The mechanic is called to repair it. If injured in so doing he certainly could not attribute the original negligence of the owner of the car as the proximate cause of his injury. So in the instant case if there was any negligence on behalf of the defendant in failing to connect up the hose in controversy earlier than it did that would not be the proximate cause but would simply furnish the opportunity for the infliction of injuries. **Fraser v. Chicago, R. I. & P. Ry. Co.,** Kan., 165 P. 831. If there was ice on the inside of this coupler, and we have pointed out that there is no evidence that there was, that was because plaintiff did not remove it and his negligence in failing so to do would be the sole

proximate cause of the accident. **Chicago, St. P., M. & O. R. Co. v. Arnold,** 8 Cir., 160 F. 2d 1002; **Louisville & N. R. Co. v. Davis,** 6 Cir., 75 F. 2d 849; **Pere Marquette Ry. Co. v. Haskins,** 6 Cir., 62 F. 2d 806. While contributory negligence is not a defense to an action brought under the Federal Employers' Liability Act yet where the negligence is that of the employee alone there can be no recovery. In **Chicago, St. P., M. & O. R. Co. v. Arnold,** supra, this court approved as proper an instruction that "if the jury found that the plaintiff was guilty of negligence and 'that his negligence was the sole proximate cause of the accident and his injuries' the verdict should be for the defendant."

The claim that this court in the first appeal in this case, **Barnett v. Terminal Railroad Assn. of St. Louis,** 200 F. 2d 893, held that the defendant might be found guilty of actionable negligence because it had failed to connect the hose between the dining and observation cars is wholly without merit. That question was not before the court and the court was merely emphasizing the wisdom of the precautionary procedure of deferring passing upon motion for directed verdict until after the case had been submitted to the jury.

We have given careful consideration to all the other contentions urged by plaintiff on this appeal and are of the view that they are wholly without merit. The judgment appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

On the previous appeal in this cause the United States Court of Appeals for the Eighth Circuit handed down the following opinion:

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 14,692.

Ferriel M. Barnett, Appellant, vs. Terminal Railroad Association of St. Louis, a corporation, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri.

[January 16, 1953.]

Forrest Boecker for Appellant.

Wayne Ely (Joseph H. Miller and Richard B. Elster were with him on the brief) for Appellee.

Before Sanborn, Riddick and Collet, Circuit Judges.

Sanborn, Circuit Judge.

Ferriel M. Barnett, a car inspector and repairman employed by the Terminal Railroad Association of St. Louis, an interstate carrier, was injured on December 29, 1950, when he was struck on one knee by the end of an air hose coupling which suddenly came apart. He brought this action under the Federal Employers' Liability Act, 45

U. S. C. A., §§ 51 et seq., for damages, upon the claim that the accident and his injuries were caused by the negligence of the defendant (appellee). The defendant denied liability.

The case has been tried twice. On the first trial the jury disagreed. Before the case was set for retrial the plaintiff moved for leave to dismiss without prejudice. The District Court denied the motion upon the ground that it would be unfair to the defendant to permit such a dismissal without requiring the plaintiff to pay the expenses and reasonable attorneys' fees incurred by the defendant, and that it appeared that the plaintiff could not pay such expenses and fees.

The case was again tried to a jury. At the close of the plaintiff's evidence the defendant moved for a directed verdict in its favor on the ground that the evidence failed to show that the accident was due to any negligence on its part. The motion was granted and the plaintiff appealed from the ensuing judgment.

Two questions are presented for review: (1) Did the court err in denying the plaintiff leave to dismiss his action without prejudice? (2) Did the court err in directing a verdict at the close of the plaintiff's evidence?

The first of these questions must be answered in the negative. Under Rule 41 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., a plaintiff, after answer has been served, has no absolute or unqualified right to dismiss his action without prejudice. **Home Owners' Loan Corporation v. Huffman**, 8 Cir., 134 F. 2d 314, 318. A District Court, in the exercise of a sound judicial discretion, may, as a condition for permitting a plaintiff to dismiss without prejudice after an answer has been filed, require him to pay the expenses and reasonable attorneys' fees incurred by the defendant. **New York, C. & St. L. R. Co. v. Vardaman**, 8 Cir., 181 F. 2d 769, 771, and cases cited.

The second question is more difficult. The plaintiff in his complaint alleged that on December 29, 1950, he was inspecting brake shoes and making an air test on certain passenger cars in the defendant's yards in St. Louis, Missouri, and that while he was tightening a steam hose coupling between two of these cars the air hose coupling between the cars burst apart, striking and injuring him. The plaintiff charged that the defendant was guilty of actionable negligence (1) in requiring him to work between cars so situated that the air hose coupling was likely to burst apart when the air pressure was turned on; (2) in assuring him that the place he was working was safe, when it was not safe; (3) in failing to provide means for releasing the air pressure in the coupling while he was working near it; (4) in failing to furnish sufficient personnel safely to perform the duties required of the plaintiff; (5) in failing to instruct him as to how to perform his duties safely; (6) in applying excessive and dangerous air pressure to the coupling which burst apart; (7) in failing to provide adequate means to inspect the equipment and to discover and replace defective equipment; and (8) in failing to guard against the likelihood of an internal explosion in the air hose.

The only evidence at the trial bearing on the issue of liability was that of the plaintiff himself. His testimony showed that he was fifty-one years of age; that he had been a machinist and a railroad man for about thirty-eight years; that he started to work for the defendant in August, 1948, as a car inspector and car repairman; that on December 29, 1950, his working hours were from 12:30 A. M. to 8:30 A. M.; that for two days each week the main part of his work was stopping air leaks and steam-heat leaks, and putting brake shoes on cars; that on other days he worked on the repair track, repairing cars and making necessary replacements, and in the yards and at the Union Station in St. Louis doing similar work.

The plaintiff's evidence relative to what occurred on December 29, 1950, was that he went out in the defendant's yards to Wabash No. 24, a train of six streamlined passenger cars, also known as the Blue Bird; that the six cars were coupled together with their air brakes set and were on Track No. 9, which runs east and west and slopes "quite a bit" toward the east; that he put blocks under the wheels of the cars to keep them from rolling when the brakes were released; that the brakes are released in repairing the train; that the blocks are made of crossties and are about ten or twelve inches long; that they are laid crossways over the rail and under the wheels; that generally one block is laid under the rear wheel of each car on one side of the train; that he found that all of the steam, air and signal lines of the train were connected except between the last two cars at the east end of the train; that the last car was an observation car, No. 1601, and the car next to it a diner, car No. 51; that the air hose connection of the diner had ice all over it; that the coating of ice was "a whole lot bigger" than the head of the air hose coupling; that in coupling up the air hose he beat the ice off of it and then made the coupling; that he also coupled up the steam heat hose and the signal line between the two cars; that after doing that he connected a steam line located in the yard near the west or head end of the train to the steam line of the train at that end, and connected the air line of the train with the compressed air line in the yard at the rear or east end of the train; that there were two compressed air lines in the yard, a high pressure line and a low pressure line; that the low pressure line was broken down and could not be used; that the pressure in the high pressure line was around 180 pounds; that after putting on the air the plaintiff started to go around the train; that he found a steam heat leak between cars Nos. 1601 and 51, the two rear cars of the train; that "the steam had blown plumb out through the top of the train" by the time he got there; that he tapped on the steam heat coupling with his hammer to close

the leak; that there was so much steam blowing out that he was unable to tell whether or not there was also a leak in the air hose coupling.

The plaintiff testified that while he was working to tighten the steam heat connection, the rear car moved about five inches all of a sudden; that the air hose coupling came apart and hit him across the leg and he fell down; that he did not know whether he hit the air hose coupling with his hammer or not; that he had noticed that the air hose coupler on car 51, the diner, had a gasket in it that was worn "a little bit," but which he felt did not need replacement; that if he had hit the air hose coupler on top with his hammer it would have had no effect on it; that after he had knocked the ice off the one end of the coupler he noticed nothing wrong with it; that it was three or four minutes after he had put the air in the train-line before the accident happened; and that a jar might knock the coupler apart.

Upon being asked what he thought caused the air hose coupling to separate, the plaintiff said that he could not tell "unless when that car [the rear car] moved it jerked it [the air hose coupling] apart." He said further that he figured that "the slack in the car is what made the car jump over the lock of wood" when the brakes released; that he thought it was the sudden movement of the car that jerked the air hose coupling apart; that if the coupler was put together properly it would lock, but a sudden jar from the movement of the train, or striking the coupler with a hammer, might knock the coupler loose; that the proper and only safe way to tighten such a coupling is to shut the angle cock between the cars and cut off the air, and that he knew that long before the accident; that when he coupled up the air hose he thought the slack was out of the coupler which held the cars together; that in order to couple the air hose he had had to pull to get the ends together; and that when the hose is slack the slack between the cars is bunched.

The plaintiff testified that while he was hitting the steam heat hose he might have tapped the air hose coupling; and, also, that he figured that ice on the air hose coupling and the hose being stretched out caused the air leak, although he thought he got the ice all off before making the coupling.

It appears that after the accident the plaintiff while in the hospital gave a statement to one of the agents of the defendant to the effect that he had discovered an air leak in the air hose coupling between the two last cars of the train, that he had tapped the coupler with his hammer in order to tighten it, and that it came apart. At the trial the plaintiff testified that he had no recollection of making such a statement, and that his physical condition, when the statement was taken, was such that about half of the time he did not know what he was doing.

It is apparent that the plaintiff's evidence made a rather unsatisfactory case on the issue of liability. He points to no specific act or omission of the defendant indicating that there was a lack of due care on its part. On this appeal, however, the plaintiff is entitled to the benefit of every inference which reasonably can be drawn from the evidence viewed in the light most favorable to him. **Hoyt v. Clancey**, 8 Cir., 180 F. 2d 152, 154, and cases cited.

In **Wilkerson v. McCarthy**, 336 U. S. 53, 61, the Supreme Court said:

"Much of respondents' argument here is devoted to the proposition that the Federal Act [Federal Employers' Liability Act] does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. Cf. **Coray v. Southern Pac. Co.**, 335 U. S. 520. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same cir-

cumstances. And a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances,' bearing in mind that 'the standard of care must be commensurate to the dangers of the business.' **Tiller v. Atlantic C. L. R. Co.**, 318 U. S. 54, 67."

The court also said in that case (page 63 of 336 U. S.):

"In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence. Here there are many arguments that could have been presented to the jury in an effort to persuade it that the railroad's conduct was not negligent, and many counter arguments which might have persuaded the jury that the railroad was negligent."

It is safe to say that in a case such as the one before us, it is unwise for a trial judge to direct a verdict at the close of the plaintiff's evidence. We think that, even though the trial court is of the opinion that the evidence will not support a verdict for the plaintiff, the court should ordinarily reserve its ruling on a motion for a peremptory instruction until after verdict. That course will usually hasten the ultimate termination of the litigation and best serve the interests of both parties. The jury's view of the sufficiency of the evidence may coincide with that of the court. If it does not, the court, despite the verdict, can enter judgment for the defendant. An appeal from such a judgment, entered after verdict, will usually terminate the controversy one way or the other, and avoid a retrial with its resulting delay, trouble and expense and the possibility of a second appeal. Compare **Moore v. Chesapeake & Ohio Railway Co.**, 340 U. S. 573-574.

In view of the liberal rules which apply to actions brought under the Federal Employers' Liability Act, and

in view of the absence of any explanatory evidence adduced by the defendant, we think it is not inconceivable that a jury could have inferred that the last two cars of the train should have been completely coupled up when they were first set out, in order to prevent the formation of ice on the couplers of the air hose during freezing weather, or that the defendant should have furnished the plaintiff with more adequate means of removing ice from the air hose coupling or of preventing the movement of the cars on the sloping track, or with an air line in the yard with lower air pressure. This is not saying that upon a retrial of this case, when all the evidence is in, the plaintiff will have made a case for the jury. We make no predictions in that regard and go no further than to say that in our opinion the defendant was not entitled to a directed verdict at the close of the plaintiff's evidence.

We think that implications reasonably to be drawn from the cases of **Stewart v. Southern Railway Co.**, 315 U. S. 283, 285-286; **Lavender v. Kurn**, 327 U. S. 645, and **Wilkerson v. McCarthy**, supra, 336 U. S. 53, support our conclusion in this case. It is possible that the more recent case of **Moore v. Chesapeake & Ohio Railway Co.**, supra, 340 U. S. 573, 577-578, may indicate a change in the attitude of the Supreme Court with respect to the quality of proof which will sustain a verdict for the plaintiff in a case brought under the Federal Employers' Liability Act, but none of that court's former decisions dealing with the sufficiency of evidence in such cases have been disapproved by it, and we may not disregard them.

The judgment appealed from is reversed, and the case is remanded for a new trial.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Thereafter, the petitioner filed his petition for rehearing which is as follows:

PETITION OF APPELLANT FOR REHEARING.

Ferriel M. Barnett, appellant in the above entitled cause, moves the court to set aside and vacate its opinion filed in this cause on January 17, 1956, and grant appellant a rehearing, for the following reasons:

I.

The opinion is contrary to controlling decisions of the Supreme Court of the United States.

(A) The decision of the court that, "So in the instant case if there was any negligence on behalf of the defendant in failing to connect up the hose in controversy earlier than it did that would not be proximate cause but would simply furnish the opportunity for the infliction of injuries . . . If there was ice on the inside of this coupler, and we have pointed out that there is no evidence that there was, that was because plaintiff did not remove it and his negligence in failing so to do would be the sole proximate cause of the accident," is in conflict with controlling decisions of the Supreme Court which hold that negligence of the railroad and the question of proximate cause of the accident and injury are always questions of fact for the jury.

Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916;
Ellis v. Union Pacific Railroad Co., 329 U. S. 649, 91 L. Ed. 572, 67 S. Ct. 598;
Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29;
Wilkerson v. McCarthy, 336 U. S. 53.

(B) The opinion erroneously injects contributory negligence of the employee and assumption of risk as defenses, contrary to the provisions of 45 U. S. C. A., § 51 et seq., and the many decisions of the courts thereunder.

Tiller v. Atlantic Coast Line Railroad Company, 318 U. S. 54, 87 L. Ed. 446.

II.

The Court in its opinion filed ignores the law of the case as expressed by this court in its previous opinion.

Barnett v. Terminal Railroad Association of St. Louis, 200 F. (2d) 893.

III.

The Court in its opinion filed fails to give to the plaintiff all legitimate inferences to be drawn from the evidence, and thus brings its opinion into conflict with controlling decisions of the Supreme Court of the United States.

(A) The decision of the Court that "There was no evidence whatever that there was any ice on the interior of this coupler and no testimony from which a jury could reasonably infer that the hose burst or came apart because of the presence of ice in the interior of the coupler," is to usurp the jury's duty to draw legitimate inferences from the evidence, and to substitute the Court's opinion as the inference to be drawn, thus failing to give to the plaintiff all reasonable and favorable inferences to be drawn from the evidence, contrary to controlling decisions.

Lavender v. Kurn, supra;
Ellis v. Union Pacific Railroad Co., supra;
Barnett v. Terminal Railroad Association of St. Louis, supra.

I.

(A) In the case of Lavender v. Kurn, 327 U. S., at 653, the Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference . . ."

The Court proceeds on in the above quotation to point out that if there is any evidence from which the jury may draw the inference of negligence as the proximate cause of injury, then the case must be presented to the jury, and it matters not that the appellate court or the trial judge may draw a different inference than the one drawn by the jury.

More particularly the Court in its opinion states that there is no evidence from which it might be inferred that there was any ice on the interior of this coupler and no evidence from which a jury could infer that the hose came apart because of the presence of ice in the interior of the coupler.

We respectfully request that the Court examine page 7 of appellant's brief where reference is made to pages 73, 74, 137, 138, 141-143, 160 and 212 of the transcript, wherein it is shown that appellant was not sure whether he had knocked all of the ice out of the interior of the coupling. He thought he had, but he did not examine the coupling very thoroughly. Mr. McCauley who was called as a witness by both parties said that if the tongue and groove arrangement of the coupler were destroyed by wearing or

some other method, the hose connection would be apt to separate under pressure (T. 218, 219, 223). This witness further stated that ice or any foreign substance in the tongue and groove arrangement, would destroy the locking mechanism (T. 236). But they would appear to be closed and locked. Now, it is true the Court struck the testimony concerning the demonstration of the coupling partially filled with metal, but nothing is said concerning the above expression of opinion and apparently it stands as evidence in this case. Even if it be said that this evidence has been stricken, there is still sufficient evidence from which the jury could infer that any foreign substance such as ice would cause the locking mechanism to appear to be in good order when actually it would be defective.

Then, it virtually stands conceded that the defendant was negligent in leaving the steam and air lines uncoupled in view of the existing weather conditions.

We admit that a jury would not be forced to draw the inference that some ice remained in the air hose coupler. But the point is that it might and reasonably could, and if it had this Court would be bound by that finding. To such effect is the ruling of the Lavender, Ellis, Tennant and Wilkerson cases, supra. The opinion here says that such finding would have no support in the evidence. This is the same as saying that all reasonable minds must agree that the defendant was not guilty of actionable negligence. The very history of this case cries out that such is not true because two juries have refused to so state. Here there are contrary inferences that are permissible. The jury may accept or disregard controverted or uncontroverted testimony, but it and it alone must draw or choose between the conflicting inferences to be drawn and we humbly submit that in its opinion the Court has failed to so rule, and in so doing conflicts with controlling decisions.

(B) In failing to connect up the hose in controversy earlier than it did the defendant was negligent under its own rules and under the facts and circumstances shown in evidence. The Court in its opinion says that this would not be the proximate cause of the accident, but rather that if there were any ice in the coupler, the plaintiff's failure to remove the same would be the sole cause of the accident.

We would humbly submit that this injects contributory negligence and assumption of risk into the case as an entire defense and in so doing conflicts with the Federal Employers' Liability Act, 45 U. S. C. A., § 51 et seq., and Tiller v. Atlantic Coastline Railroad Co., 318 U. S. 54. The negligence, if any, in failing to remove ice from the coupler could be no more than contributory, and a jury could reasonably find in looking at the total negligence picture, as they would be required to do, that the only negligence was that of the employer in requiring the work to be done in a poorly lit place and without adequate tools and help. (These latter two elements would only be submitted in determining the issue of contributory negligence as contrasted to sole negligence, if any, and deal only with the issue of failing to remove the ice from the coupling.)

II.

The Court in its opinion filed points out that this cause was tried on an amended petition. But the testimony was virtually the same, omitting any reference to a sudden jerking of the cars. There are some conflicts as to prior inconsistent statements, but those conflicts are for the jury. This Court in its previous opinion says that it is not inconceivable that a jury might find the defendant negligent in failing to couple up the cars when they were first set out, in order to prevent the formation of ice on

the couplers of the air hose during freezing weather, or that the defendant should have furnished the plaintiff with more adequate means of removing ice from the air hose coupling.

It seems to us that this is still true and is the law of the case. If so, it may not be changed on a second appeal. The law of this case is, we submit, that there is a jury question presented, and the Court in its opinion filed conflicts with its own decision in the case of Illinois Central Railroad v. Crail, 31 F. (2d) 111.

III.

(A) The evidence here shows that there was ice on this coupler. We have already pointed out that the plaintiff was not sure that he removed all of the ice. These are facts not inferences. From this it would seem that the jury could infer that this would interfere with the locking mechanism. A jury has wide range under the Supreme Court decisions and it will not do to say that any reasonable inference is speculation as is clearly set out in Lavender v. Kurn, supra, and other cases cited in appellant's brief. In holding that such inference would be speculation, the Court conflicts with those opinions. Much of what we said under point I, (A) and (B) would here apply and we will not repeat it. In connection with both of these points we would like to submit that in the Court's reasoning to illustrate the sole negligence of appellant, the Court uses the analogy of an auto owner and a garage mechanic or repairmen. We would have no quarrel with the conclusion reached as to that specific situation. But we do question its application here. This for the reason that the relationship of master and servant is not there involved and the duty owing to an independent contractor is very different than that owing to a servant.

Because of the matters here presented and because of the ruling of the Court sustaining a directed verdict in favor of defendant at the close of all of the evidence, we respectfully submit that this opinion is in conflict with the controlling decisions of the Supreme Court which are cited in this petition for rehearing, and we therefore submit that this rehearing should be granted.

Shaw & Smith,
Charles M. Shaw,
Wayne C. Smith, Jr.,
110 South Central,
Clayton 5, Missouri.

Certificate of Counsel.

I, Wayne C. Smith, Jr., one of the attorneys for the Appellant, do hereby certify that the foregoing petition for rehearing is submitted in good faith and believed to be meritorious.

Wayne C. Smith, Jr.

Thereafter the petition for rehearing was overruled and the mandate of the United States Court of Appeals for the Eighth Circuit was filed on the 16th day of March, 1956.

MAY 15 195
HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1955.

No. 914.

FERRIEL M. BARNETT,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1955.

No. .....

FERRIEL M. BARNETT,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

STATEMENT.

The petition for certiorari is not accompanied by a certified transcript of the record, but references to certain pages of the typewritten transcript filed in the District Court appear in the petition for certiorari, and in the ap-

pendix thereto filed by petitioner. Therefore, in referring to the evidence, respondent will give the page numbers where that evidence appears in the typewritten transcript.

Petitioner, as plaintiff in the District Court, sued defendant (respondent here), seeking to recover damages under the Federal Employer's Liability Act, alleging that he was injured by reason of defendant's negligence in permitting the air brake hose and the steam pipe on each of two cars in defendant's railroad yard to remain uncoupled and in a position where steam was escaping from the steam pipe between those two cars at a time when the weather was below freezing; that as a direct result of such negligence, "Ice formed in and upon the couplers of said air hoses and wholly or partly as a result thereof, plaintiff was unable to make a secure coupling of said air hoses by reason of the existence of ice in and on such coupling, so that they burst apart, struck, and injured Plaintiff, as hereinafter stated" (Appendix p. 2).

Defendant admitted the employment of plaintiff as alleged, denied that it was negligent, and pleaded that plaintiff's injuries resulted solely from his own negligence (Appendix pp. 3-4).

Plaintiff testified that the steam and air hose connections between the two cars mentioned were left uncoupled, as stated by petitioner, that the weather was cold, and that by reason of condensation of escaping steam from the open steam line, a lump of ice larger than a man's fist formed on the head of the air hose coupler. He testified that he knocked the ice off the coupler with a hammer, and then coupled the air hose together. We cannot accept petitioner's statement that plaintiff "could not be sure that he removed all of the ice" (Petition, p. 6).

At the trial plaintiff testified that before he coupled the air hose together, ice was "piled up there, kind of mushroom-like" on the head of the coupling (T. 67). Then, on direct examination:

> "Q. Now, what did you do about the ice?"
>
> "A. Well, I took my hammer and knocked it off there. * * * I worked with my right hand and I just knocked it off and took the hammer, hit it like this, and shake them off and hook them together" (T. 69).

That he laid his lantern on the side of the car, and held the hammer in his right hand. Then:

> "Q. Now, did you take hold of that (coupling) when you hit, knocked the ice off of it, or not?"
>
> "A. Yes, sir" (T. 70).
>
> "Q. Now, you were here and hitting it, how many times would you hit it?"
>
> "A. I hit it about twice, I guess, just enough to knock the ice off of it" (T. 71).

On cross-examination plaintiff testified that it was his job to knock the ice off (T. 136); that "You have to knock it off to make a coupling if you got ice on" (T. 137); and that when he put the couplings together, "they went down and locked, just like they usually do, routine work, work every night on it. * * * they buckled and dropped down like that there, that is what we go by" (T. 138).

> "Q. But you knocked it off?"
>
> "A. Yes, sir."
>
> "Q. With your hammer?"
>
> "A. Yes" (T. 139).

That after he knocked the ice off and coupled the hose, he "just picked it up and hit it like that there and laced them together".

"Q. After you knocked the ice off with your hammer, you said you gave it a couple licks, whatever it was?"

"A. Yes, sir."

"Q. When you laced them together, like shown here, they went together all right?"

"A. I thought they did."

"Q. There wasn't anything you could notice to keep them from going together?"

"A. No, sir" (T. 140).

Plaintiff further testified that the couplers "would not go plumb down together if there was any ice in here", and that when he put them together he did not notice anything wrong with them; that there is an interlocking device consisting of a groove on one coupler head and a "lock washer" on the other; that the groove, or flange, is about a quarter-inch deep, and that the lock washer fits into it.

"Q. Haven't you put enough (air hose couplings) together you could tell that went in all right?"

"A. I thought it went in there."

"Q. If there had been anything in there, there had been any ice or a lump of coal or anything else in there that head could not have gone in there, could it?"

"A. No, not if it had any lump of coal in it, it could not go in there, could not go in there if it had any ice in there" (T. 143).

Plaintiff admitted that at the first trial he testified that there was ice "probably as thick as your fist on them air hose that accumulated there and I take my hammer and beaten it off", and then made the coupling, and then testified at the third trial that he beat the ice off the coupling before connecting it (T. 184-185). Finally, after further questioning about his testimony at the first and second trials, he was asked:

"Q. Now, I asked you this morning, and I will ask you again whether you knocked all that ice off of the coupling when you knocked it off with the hammer, did you knock it all off?"

"A. All off the head of it."

"Q. What?"

"A. Off the head of the coupling and coupled them together" (T. 195).

Respondent cannot accept petitioner's statement that when plaintiff knocked the ice off the coupler, he could not be sure he removed all of it (Petition, p. 6), and, in view of plaintiff's testimony that when he "laced" the air hose couplings together there was nothing he could notice which prevented a proper coupling and that a proper coupling could not be made "if it had any ice in there" (T. 143), we think petitioner should have stated that plaintiff so testified instead of saying merely, "There is also some testimony that a coupling could not be made if there was any foreign matter in the coupling unit" (Petition, p. 7).

As has been seen, plaintiff testified positively that the coupling could not be made if it had ice in it. And plaintiff's witness McCauley so testified on direct examination by plaintiff's counsel, as follows:

"Q. In other words, anything, whether it be metal that is in here, ice or anything else, would break your tie that holds your coupler together, would it not?"

"A. It would prevent it from coupling properly."

"Q. If there was any ice or anything down in there it will destroy your locking mechanism?"

"A. Yes, that is it" (T. 234-236).

The facts should also be made to more fully appear as to the reason why the air hose coupler referred to at pages 7 and 8 of the petition for certiorari was withdrawn from

the jury, and why the testimony there set out was stricken by the trial court.

All that appears in the petition is that petitioner examined plaintiff's witness McCauley concerning a piece of air hose and a coupling which he exhibited to the witness and to the jury; that "counsel for respondent cross-examined this witness about this particular locking mechanism. Then on the next day counsel for respondent moved that all of this testimony be stricken and it was ordered stricken by the Court (T. 303).

The facts are that on the first day of the trial plaintiff's counsel produced two pieces of air hose, each part being equipped with a "head" (T. 14), with a "lip" on one head and a "groove" on the other, which were identified as exactly like the air hose and couplings involved in the case, and were introduced in evidence with an explanation as to how the two pieces of hose were locked together by fitting the lip into the groove (T. 17). When those two pieces of air hose were put in evidence, plaintiff's counsel marked the lip and groove of the coupler with chalk (T. 16-17); and the witness McCauley put them together and explained to the jury that the locking of the coupler in such manner would prevent the heads from pulling apart on lateral movement (T. 17-19), and testified that if the coupler "was wore to the point that there was no tongue-and-groove left, or if the head of the hose is spread apart in some way, then it would pull apart" (T. 19).

Later, McCauley was recalled by plaintiff and a third and different piece of hose was produced and exhibited to the jury with one of the two pieces first used without explanation that it was a different hose. The third hose was not identified or formally introduced, and both the Court and defendant's counsel were ignorant of the fact

that it was not the same hose that had been introduced previously. The tongue and groove had been marked with chalk in the same manner as the hose that was originally introduced (T. 234-235). The head on the third piece of hose was the same kind of head as the one on the first piece. But the groove on the head of the third hose had been filled in with metal, which fact was unknown to the Court or to defendant's counsel, and which fact was not developed until the following day during a conference in the Court's chambers, and it was then developed only after extended discussion concerning the presence of the metal in the groove of the coupler head.

During the colloquy in the Court's chambers, plaintiff's counsel stated, with reference to the use of the third air hose, that he had McCauley examine it, "and explain to the jury the fact that this little tongue-and-groove arrangement had been destroyed, that was the first thing I did."

> "Mr. Ely (defendant's counsel): Do you mean when you first introduced the coupling?"
>
> "Mr. Fredrickson (plaintiff's counsel): I had the coupling there."
>
> "The Court: Before you introduced it, according to the statement?"
>
> "Mr. Fredrickson: Right."
>
> "Mr. Ely: Before he introduced it the first time?"
>
> "Mr. Fredrickson: Right. And it was after that that we had the demonstration, that is perfectly proper to do because it does demonstrate it better than any words or any testimony how a coupler would operate or work if your tongue or groove or flange or anything were destroyed, which the jury can believe did occur in this case."

"Mr. Ely: I don't see how they could and if there was such testimony at the time the coupler was first introduced I did not get it, and Mr. Voorhees (associate counsel), who sits here, says he did not get it. Is that right? I do not recall any such evidence as that. The first time I heard anything about a defect—"

"The Court: That would show up when Mr. McCauley first took the stand in the early part of his testimony?"

"Mr. Fredrickson: No, that came in, Your Honor, if you will recall, Your Honor—"

"Mr. Ely: That is why I am complaining about it."

"Mr. Fredrickson: It doesn't matter whether it came in one time or another."

"Mr. Ely: It makes a big difference."

"The Court: I understand your statement, I get the impression from your statement that you initially asked him all about this."

"Mr. Ely: When he first put him on the stand."

"Mr. Fredrickson: No, I started to and if you recall at that time objection was made that there was no foundation for such testimony * * *" (T. 291).

After further colloquy, defendant's counsel then stated that nothing was said about a defect until McCauley was brought back to the witness stand the second time, and the colloquy continued:

"Mr. Fredrickson: I agree."

"Mr. Ely: At the end of plaintiff's case."

"The Court: I understand. What I am trying to do is to ascertain what happened, so I can know."

"Mr. Fredrickson: Where Mr. McCauley identified this air hose with the weld in it would be right at the close of plaintiff's case."

"Mr. Ely: And that is the first time I knew that it had a weld in it."

"The Court: That was after the demonstration was made."

"Mr. Ely: After it had been used for a number of demonstrations."

"Mr. Fredrickson: No."

"Mr. Ely: No, I don't mean—"

"The Court: Well, when McCauley was on the first time, didn't he make some demonstration?"

"Mr. Fredrickson: Your Honor, I have three air hose out there. These two are in the ordinary usual condition. Mr. McCauley identified them. There was a demonstration as to these. I started inquiring, laying a foundation preparatory to introducing my third one."

"Mr. Ely: I didn't know you had three. I thought you just had two."

"Mr. Fredrickson: Well, whether you knew it or not I started to lay that foundation. We had the conference here and you said after our discussion as I understood it that you believed until there was further evidence introduced, further foundation laid it would be improper to go into it at that time. * * * So, I did not go into it until I laid further foundation. Then I recalled Mr. McCauley and on my recall of him I then introduced in evidence the third air hose, and at that time was when we had the demonstration."

"Mr. Ely: I thought you did not introduce it in evidence. You picked it up and showed it to McCauley" (T. 292-294).

The case was then re-opened, the trial resumed, and defendant called Mr. Fredrickson, plaintiff's counsel, as a witness.

Mr. Fredrickson testified that when he first called Mr. McCauley to the stand he made use of two certain couplers or two pieces of air hose in making certain demonstrations, and that when he called McCauley back to the stand, he produced one of those two pieces originally used,

and a third, and different, piece of air hose, which he used for another demonstration; that the third piece of hose had not previously been used in the case (T. 295); and that when he produced the third hose, he did not announce that it was a different one (T. 296).

Mr. Fredrickson then testified that the flange on the lip of the third air hose had been filled in with metal at his direction (T. 296-297); that before using it he did not advise the Court or opposing counsel that it was a different air hose from the one he had been using (T. 298); that he picked it up from the floor under the table, and that "I did not make any statement to you or His Honor, or to Mr. McCauley or to the jury, or anyone, that I have a third air hose here" (T. 299); that in having the groove of one connection filled with metal, "I acted upon my own suggestion. * * * I had two air hoses and I played with them, worked them, saw how they worked, and I figured that just as a simple matter of the way things operate, anything that would destroy this groove here—"

"Mr. Ely: I object to exhibiting this air hose to the jury."

"The Court: Sustained."

"Mr. Ely: It is not shown to be a similar condition or in similar condition as the air hose involved in this lawsuit."

"A. (By Mr. Fredrickson): Well, we had agreed originally with Mr. McCauley, Your Honor, that these were similar."

"Mr. Ely: Not that one."

"Mr. Fredrickson: This one."

"Mr. Ely: Not that one there."

"Mr. Fredrickson: That is not the one I have in my hand. I determined from putting these together and taking them apart myself what kept these hose from

> sliding in this movement or this direction was your groove here, and your groove that is in there, and that anything that would destroy that groove, take it out of there, is going to destroy your locking mechanism in here, and having concluded that, I then thought, in order to explain it or show it adequately to the jury that it would be advisable to have a weld placed in one of them if I could get a weld in there" (T. 300-301).

Plaintiff's counsel then explained how he had the weld placed in the air hose coupler in order that he might use it for demonstration purposes (T. 302-303), and the Court sustained the defendant's motion to withdraw the welded hose from evidence and instructed the jury to disregard it (T. 303).

ARGUMENT.

I.

Petitioner contends that the judgment of the Court of Appeals should be reversed because the evidence given at the trial is conflicting and would support different inferences. He fails to point out any reasonable inference in his favor that could be drawn from the evidence, and we submit that no such inference is possible under the evidence.

Petitioner argues, at page 14 of his brief, that the jury could have found respondent negligent in failing to provide him with adequate tools to remove ice from the inside of the air hose coupler. Such argument cannot be sustained because, in the first place, as stated by the Court of Appeals:

> "There was no evidence whatever that there was any ice on the interior of this coupler and no testimony from which a jury could reasonably infer that the hose burst or came apart because of the presence of ice in the interior of the coupler" (Appendix 24).

Secondly, such contention cannot be sustained because there was no pleading to justify the submission of such an issue to the jury, and there was no evidence that the tools with which petitioner was provided (the hammer and the lantern) were inadequate. It will be remembered that plaintiff testified at the trial that he did knock the ice off the coupler with the hammer; that it was his job to do so; that he went about that job in the usual manner; and that the ice came off (T. 69-71, 139-140, 195). Plaintiff did not complain at the trial that the hammer was an in-

adequate tool and cannot now contend that it was, or that there was any evidence from which the jury could have so found.

Petitioner complains the evidence was conflicting, but does not point out wherein it conflicts, and we are unable to discover any conflict except in the testimony of plaintiff, and the contradictory claims and statements that he made, which have been heretofore referred to.

To support his first point petitioner relies upon three decisions of this Court. As we read and interpret those cases, all of them rule against petitioner's contention. We shall consider them briefly.

Lavender v. Kurn, 327 U. S. 645, 653, recognizes that when there is a complete absence of probative facts to support a plaintiff's case, he cannot recover. True, the Court in the Lavender case ruled that "whenever facts are in dispute, or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most **reasonable** inference". But that case does not hold that the jury may indulge in an inference that is without an evidentiary basis. As stated in the opinion of the Court of Appeals in this case, where an inference in favor of plaintiff "could be based only upon conjecture, possibility, speculation or guess (Appendix 24) * * * it cannot be said that there is substantial evidence sustaining plaintiff's contention, and, hence, as a matter of law plaintiff was not entitled to recover" (Appendix 24-25). To like effect, **Wilkerson v. McCarthy,** 336 U. S. 53, 61, holds that where the evidence will not rationally support a verdict for the plaintiff, it is the duty of the trial judge to enter a verdict for defendant, and that "he fails in his

duty to take a case from a jury when the evidence would not warrant a verdict by it".

Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29, declares:

> "In order to recover under the Federal Employer's Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line Ry. Co., 318 U. S. 54, 87 L. Ed. 610, 617, 63 S. Ct. 444, 143 A. L. R. 967. Petitioner was required to present probative facts from which the negligence and causal relation could reasonably be inferred."

It has been seen that in the amended complaint on which this case was tried in the District Court, the only negligence alleged was that defendant left two passenger cars uncoupled in its railroad yard during freezing weather, with steam escaping from a steam pipe between those cars, which resulted in the formation of ice "**in** and upon" the couplers of the air hoses between said cars, and that because of the presence of such ice "**in** and on such coupling, * * * they burst apart" (Appendix 2).

As has been seen, and as was stated by the Court of Appeals, there was no evidence whatever that ice was at any time on the **interior** of the coupler, and no testimony from which a jury could reasonably infer that the hose came apart because of the presence of ice on the interior of the coupler (Appendix 24). Therefore, there was no evidence from which a reasonable inference could be drawn in favor of plaintiff's contention, and such is the law as declared by this Court in Lavender v. Kurn, Wilkerson v. McCarthy, and Tennant v. Peoria & Pekin Union Ry. Co.

II.

Petitioner's second point is that the Court of Appeals injected contributory negligence as a defense in the case, in support of which contention petitioner argues that "there was substantial evidence from which a jury could infer that ice remained in the coupler, i. e. inside". But, no such evidence is to be found in petitioner's brief or in the appendix. Nor is there any such evidence in the record. Therefore, we consider that this contention of petitioner is sufficiently answered by the statement of the Court of Appeals that "**there was no evidence whatever that there was any ice on the interior of the coupler**" (Appendix 24).

Petitioner again relies upon Tiller v. Atlantic Coast Line Ry. Co., 318 U. S. 54, to support his claim that contributory negligence will not defeat a plaintiff's right to recover in a case under the Federal Employer's Liability Act. That is true, and that is the law, but it is also the law, as announced in the Tiller Case that in order to make a case under the Act, a plaintiff must prove that the defendant was negligent "and that such negligence was the proximate cause" of his injuries. There was an utter failure in this case to prove that defendant was negligent as charged, and, therefore, the Tiller case affords no authority for petitioner's contention.

Furthermore, the Court of Appeals did not "inject contributory negligence as a defense in this case", as claimed by petitioner. What the Court of Appeals said was:

> "While **contributory negligence is not a defense** to an action brought under the Federal Employer's Liability Act, yet where the negligence is that of the employee alone, there can be no recovery" (Appendix 26).

That is the only sentence in the opinion of the Court of Appeals where the words "contributory negligence"

appear, and nothing is said in the opinion to the effect that contributor negligence might be relied upon as a defense in a case nder the Federal Employer's Liability Act. Therefore, respondent submits that petitioner has evidently misiterpreted the opinion of the Court of Appeals, and that there is no basis for his contention that contributory negli ence was injected in the case.

III.

The Cou t did not err in withdrawing from consideration of the ary the third piece of air hose, which was never formally in roduced and was not identified as a different hose from ne of the two that had been previously put in evidence.

At page 1 of petitioner's brief, under "Summary Of Argument" petitioner cites two cases, **Teal v. Bilby,** 123 U. S. 572, nd **Wilkinson v. Livingston,** 45 F. 2d 464. No further ref ence is made to those, and petitioner does not state wher in he considers that they support his contention.

The facts with reference to the use of the third hose do not appear in petitioner's statement, nor in the excerpts of the testi ony in the appendix which he has filed (Appendix 12-5).

It does ot even appear in petitioner's statement, or brief, or in he appendix to his petition, that three pieces of air hose were used. At page 6 of his statement petitioner says, "Two exhibits were offered of a coupling such as the one n use on the occasion in question", and from petitioner's tatement and from his argument it would appear that o y two pieces of air hose were produced at the trial. In th argument petitioner says, "the **second** coupler offered had a metal weld to simulate the presence of ice" (p. 15). N reference is made to a third coupler.

That is why respondent considered it necessary to state the facts more fully, so that this Court might be advised that a third piece of hose, which had been previously prepared by filling the groove of the coupler with metal, so that it would not couple, was used for demonstration purposes at the trial.

At page 15 of his argument petitioner mistakenly says, "Counsel for the respondent knew that petitioner's counsel, Mr. Fredrickson, was using a different coupler from the one first used in evidence". That is not true; it clearly appears from the record that respondent's counsel **did not know** it was a different coupler, and was not advised that it was a different one until after an extended colloquy in the Court's chambers (T. 291-294).

As stated by the Court of Appeals:

> **"it is perfectly manifest on the record that neither the court nor opposing counsel knew that this so-called exhibit had not been previously admitted in evidence"** (Appendix 20).

As was stated in the opinion of the Court of Appeals:

> "The locking mechanism in the third piece of hose had been so altered by inserting a foreign piece of metal therein as to render it ineffective and wholly unlike the actual condition of a normal locking mechanism" (Appendix 21-22).

In **Specht v. Howard**, 33 U. S. 564, 16 Wallace 564, 21 L. Ed. 348, this Court held that evidence improperly admitted may thereafter be stricken out by the Court. In 32 C. J. S. 457, sec. 607, it is stated that "In order that an article may be introduced it must be satisfactorily identified and it must also be shown to the satisfaction of the Court that

no substantial change in the article exhibited as to render the evidence misleading has taken place".

It is too clear for argument that the third piece of hose was improperly exhibited to the jury, that the use of it for demonstration purposes was confusing and misleading, and we submit that the Court did not err in withdrawing that hose from the evidence and instructing the jury to disregard it and the demonstrations that had been made with it.

IV.

Petitioner's contention that there is a conflict between the opinion which is the subject of his petition to this Court, and the prior opinion of the Court of Appeals cannot be entertained. Both opinions are set out in the appendix to the petition.

The original complaint has been presented to this Court, but the negligence charged in the original complaint is stated in the first opinion (at page 29 of the appendix). It there appears that plaintiff originally charged that defendant was guilty of negligence (1) in requiring him to work between cars so situated that the air hose coupling was likely to burst apart when the air pressure was turned on; (2) in assuring him that the place he was working was safe, when it was not safe; (3) in failing to provide means for releasing the air pressure in the coupling while he was working near it; (4) in failing to furnish sufficient personnel safely to perform the duties required of the plaintiff; (5) in failing to instruct him as to how to perform his duties safely; (6) in applying excessive and dangerous air pressure to the coupling which burst apart; (7) in failing to provide adequate means to inspect the equipment and to discover and replace defective equipment; and

(8) in failing to guard against the likelihood of an internal explosion in the air hose.

Further on in that opinion (at pages 30 and 31 of the appendix), the Court of Appeals relates the claim then made by plaintiff as to what occurred at the time of his injury, and as to what caused the air hose to separate, to-wit, that while plaintiff was in between two cars, attempting to stop a leak in the steam line by tapping on it with his hammer, the rear car suddenly moved about five inches and pulled the air hose coupling apart. There was no such claim at the third trial, no testimony to that effect, and no such allegation in the amended complaint.

By reference to the opinion which is the subject of plaintiff's petition for a writ of certiorari, it will be seen that the third trial was had on an amended complaint, which is the complaint set out at pages 1 to 3 of the appendix. At page 17 of the appendix the Court of Appeals says:

> "This complaint was an amended and substituted complaint in that it did not by reference or otherwise embody the allegations of the complaint as originally filed."

In other words, before the third trial plaintiff changed his complaint, and proceeded upon an entirely different theory than at the previous trial. Under such circumstances, respondent submits that there could be no conflict between the two opinions, because a different case was presented on the second appeal than on the first.

Respondent respectfully submits that the evidence does not justify submission of any of the five questions which are presented on page 4 of petitioner's brief; that petitioner has shown no reason why a writ of certiorari

should be granted; that no such reason appears in the record; and that the petition should be denied.

Respectfully submitted,

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